

BEFORE THE  
POSTAL REGULATORY COMMISSION

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Amendment of Rules Relating to  
Non-Public Information

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Docket No. RM2018-3

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COMMENTS OF UNITED PARCEL SERVICE, INC. ON  
NOTICE OF PROPOSED RULEMAKING RELATING TO  
NON-PUBLIC INFORMATION  
(March 23, 2018)

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United Parcel Service, Inc. (“UPS”) respectfully submits these comments in response to the Commission’s Order No. 4403 (February 13, 2018), seeking comments on proposed revisions to existing regulations relating to non-public information.<sup>1</sup> The Commission has proposed to replace in its entirety the existing rules appearing in 39 C.F.R. § 3007.<sup>2</sup> The Commission also proposed to amend and move rules regarding information requests to 39 C.F.R. § 3001, subpart E, as well as to update two rules in 39 C.F.R. § 3004 concerning the application of the Freedom of Information Act (“FOIA”) to materials that are provided to the Commission with the reasonable belief that materials are exempt from public disclosure.<sup>3</sup>

In the case of the Postal Service, public transparency is essential to protecting the public interest. While UPS recognizes the importance of protecting commercially sensitive information from public disclosure, UPS generally

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<sup>1</sup> Notice of Proposed Rulemaking Relating to Non-Public Information, Dkt. No. RM2018-3 (Feb. 13, 2018) (“Order No. 4403”), at 37.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 1-2.

supports all measures to increase public transparency in proceedings before the Commission. The Postal Service is the “second largest employer in the United States,”<sup>4</sup> second only to Wal-Mart. The Postal Service enjoys a statutory monopoly on letter mail delivery and access to mailboxes,<sup>5</sup> delivers more packages than any private company, and the value of the postal industry is often cited as in excess of a trillion dollars.<sup>6</sup> Yet, the federal regulatory agency that oversees the Postal Service’s regulated monopoly, unregulated businesses, and the legal fences between them, is one of the smallest of all federal regulatory agencies.<sup>7</sup> Further, there is no Congressional review through the appropriations process as the Postal Service is largely self-financing. Public scrutiny and public disclosure are essential to complement what oversight that the Commission can achieve with its limited staff and resources. Thus, the Commission should strive to ensure that all changes proposed will increase, rather than decrease, publically-available information and ensure that the necessary information is available and understandable to all potential stakeholders.

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<sup>4</sup> United States Postal Service, *Working at USPS*, <https://about.usps.com/careers/working-usps/welcome.htm> (last accessed Mar. 23, 2018).

<sup>5</sup> FEDERAL TRADE COMMISSION, ACCOUNTING FOR LAWS THAT APPLY DIFFERENTLY TO THE UNITED STATES POSTAL SERVICE AND ITS PRIVATE COMPETITORS 27-28 (2007).

<sup>6</sup> See, e.g., United States Postal Service, *Postal Facts 2017*, <https://about.usps.com/who-we-are/postal-facts/postalfacts2017-v2.pdf> (last accessed Mar. 23, 2018) (“The U.S. Postal Service is the core of the more than \$1.4 trillion mailing industry that employs more than 7.5 million people.”).

<sup>7</sup> Kevin Kosar, *The Postal Regulatory Commission’s \$50 Billion Decision*, BROOKINGS (Oct. 25, 2016), <https://www.brookings.edu/blog/fixgov/2016/10/25/postal-regulatory-commission/> (last accessed Mar. 23, 2018) (referring to the Commission as a “small agency” with about 70 employees).

Some information truly deserves nondisclosure. UPS applauds the Commission's efforts to clarify and update the rules on the handling of sensitive information, and the conditions under which it can be publicly disclosed.

However, there is one aspect of the proposed changes in this order that would appear not just to thwart additional transparency, but to reverse it. Specifically, current regulations provide that non-public materials automatically lose their non-public status ten years after their filing, unless the Commission decides to extend that status.<sup>8</sup> In contrast, the proposed rules would keep the material unavailable to the public after ten years, potentially forever, unless someone petitions and justifies their unsealing.<sup>9</sup> This turns public disclosure on its head.

**I. THE PROPOSED RULES WOULD MAKE IT HARDER, NOT EASIER, TO ACCESS EXPIRED NON-PUBLIC MATERIAL**

In originally issuing 39 C.F.R. § 3007.30, the Commission clearly thought that non-public information should retain that status no longer than ten years after its filing, unless the Commission affirmatively saw justification to extend that period. The current rule reads:

Ten years after the date of filing with the Commission, non-public materials shall lose non-public status unless the Commission or its authorized representative enters an order extending the duration of that status.

Thus, the default status under current regulations is that after ten years, the material loses its non-public status, absent no additional action by the Commission. We further assume that the Commission would consequently and

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<sup>8</sup> 39 C.F.R. § 3007.30.

<sup>9</sup> Order No. 4403 at 66-68.

automatically make the non-disclosed material available to the public under the current regulation.

In contrast, the Commission's proposed rule includes the following clauses:

(a) Ten years after the date of submission to the Commission, non-public materials shall lose non-public status unless otherwise provided by the Commission.

(b) Motion for Disclosure of Materials for Which Non-Public Treatment has Expired. Any person may file a motion requesting that materials for which non-public treatment has expired under paragraph (a) of this section be publicly.”

(f) Ruling. The Commission may grant the motion [or]. . . [t]he Commission may deny the motion and enter an order extending the duration of non-public status at any time after the reply period described in paragraph (d) of this section has expired. The determination of the Commission shall balance the interests of the parties as described in § 3007.104.<sup>10</sup>

While proposed subsection (a) appears to continue the default condition of disclosure after ten years, proposed subsection (b) appears to undercut and reverse that by requiring a motion for disclosure that identifies the material requested for disclosure, the dates that the materials were originally submitted under seal, whether notice was given and how, and whether the disclosure is requested, and finally approval (or possible denial) by the Commission pursuant to a balancing test under subsection (f). In other words, even ten years after the material has been filed, there apparently will be no disclosure unless someone meets this burden of affirmatively seeking disclosure and gaining Commission approval. Otherwise, the material remains unavailable to the public after ten years, for a potentially indefinite period.

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<sup>10</sup> *Id.* at 66-69 (proposed 39 C.F.R. § 3007.401).

Of course, those who seek public disclosure of non-public material are the least likely to know what the non-public material contains, what to ask for, and why it deserves disclosure, especially after ten years. The procedure proposed in the Order, if adopted for material at least ten years old, may also incentivize excessive redaction so as to further obscure the non-public material and lessen the likelihood that potentially interested parties might successfully move to unseal the materials after ten years of its filing. The proposed rule certainly appears to create a default condition of non-disclosure of material, even after ten years.

While UPS does not disagree that certain information, such as customer-specific data, should be maintained as confidential for an extended period, we think that after ten years, the public disclosure of other, non-customer-specific data, should either (a) become automatic, or (b) the burden for justifying non-disclosure should be placed on to those who want extended non-disclosure beyond ten years. As an example, UPS advocates automatic public disclosure of most, if not all, documents and related schedules supporting the Annual Compliance Report (“ACR”) after ten years. Otherwise, the Commission’s proposed procedure will make it more burdensome for outside parties to access information, even if that information is old and not sensitive.

UPS urges the Commission not to use the new rule to preserve the non-public status of certain old data for indefinite (or longer) periods, but set up a framework for when non-public data will be available for disclosure, as well as the level of disclosure. This framework would include timing of disclosure for different types of non-public data (e.g., ACR data versus negotiated service

agreement data) and level of disclosure (e.g., class-level data, product-level data, customer-specific data, or all data).

UPS also considers the proposed mechanism for access to 10-year-old non-public materials to be excessively burdensome. For instance, the proposed rule § 3007.401(b) contemplates that moving parties will have to (i) specify whether notice was provided to parties with a potential proprietary interest in the non-public materials (including the dates, times, and methods of notice), and (ii) provide detailed justifications for why the materials should be made public.<sup>11</sup> These steps might be burdensome if moving parties are seeking data that likely involve many parties with potential proprietary interests, such as with the Universal Postal Union data that covers over 190 countries.

Similarly, the proposed rule § 3007.401(f) contemplates that the Commission will “balance the interests of the parties” in deciding whether to unseal 10-year old data.<sup>12</sup> But if the Commission plans to use the same standard for determining if 10-year old non-public materials should be unsealed as it does for newer materials under proposed rule § 3007.104, this might seem to negate the purpose of having a 10-year expiration period at all.

Rather, UPS recommends that non-public information should generally become publicly-available after ten years and published on a regular schedule, unless the Postal Service or other filer demonstrates that material harm will result due to such publication. In addition, we recommend that the burden of proof to justify continued non-disclosure be maintained by the Postal Service beyond a

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<sup>11</sup> *Id.* at 66.

<sup>12</sup> *Id.* at 68.

mere “balancing of interests” and to a “material harm” standard, as a regulated entity with monopoly powers competing with the private sector should be held to transparency standards beyond those imposed on third parties and outside organizations.

An example of unnecessary non-disclosure is already before the Commission in Docket ACR2017, where the Commission has sought comments to its preliminary determination to unseal certain information on terminal dues revenues, specifically, revenue data by country group and shape for Inbound Letter Post.<sup>13</sup> Even after the Commission narrowed the data that should be disclosed to very high-level, aggregated information, the Postal Service continued to assert that the material is proprietary, sensitive, and should not be published.<sup>14</sup> In fact, when the Commission had earlier proposed the publication of a broader set of data, within days, the Postal Service had requested a stay in order to potentially appeal the proposal to the U.S. Circuit Court of Appeals for the District of Columbia,<sup>15</sup> which, if it had proceeded, might have effectively prevented the data from being published for years.

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<sup>13</sup> See Notice of a Preliminary Determination to Unseal the Postal Service’s Response to Chairman’s Information Request No. 15, Dkt. No. ACR2017 (Feb. 16, 2018), at 8-9; Chairman’s Information Request No. 15, Dkt. No. ACR2017 (Feb. 7, 2018) at 2.

<sup>14</sup> See Response of the United States Postal Service to Order No. 4409, Dkt. No. ACR2017 (Feb. 23, 2017), at 3-9.

<sup>15</sup> See Motion of the United States Postal Service to Stay Order No. 4394 Concerning the Unsealing of Material Filed in Response to Chairman’s Information Request No. 1, Question 1, Dkt. No. ACR2017 (Jan. 29, 2018), at 1.

## **II. UPS SUPPORTS UPDATING RULES AND ELIMINATING REDUNDANT TERMS AS PROPOSED BY THE COMMISSION**

UPS supports the Commission's proposal to move rules on applicability and scope of information from the existing § 3007.2 and § 3007.3 to the proposed § 3001.100.<sup>16</sup> UPS also agrees with moving rules from the existing § 3007.3 to the proposed § 3001.101 to codify the Commission's ability to issue a Chairman Information Request ("CHIR") at any time after the motion. Both proposals are consistent with the existing code and would dispense with redundant terms, while confirming that information requests often are not limited to non-public data.

The Commission also proposed making conforming changes to the existing § 3004, which contains rules describing the relationship between FOIA, the Privacy Act, and the Commission's procedures governing appropriate confidentiality<sup>17</sup>. The Commission's proposal reflects that the Postal Service will submit non-public materials in line with submission procedures (listed in § 3007) in instances where it believes materials are exempt from public disclosure. The proposed rules also take into account the submission of non-public materials by non-Postal Service parties, and include amendments to reflect the fact that non-Postal Service parties may submit non-public materials in line with submission procedures (listed in § 3007) in instances where parties believe materials are exempt from public disclosure. UPS supports these changes as proposed by the Commission.

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<sup>16</sup> Order No. 4403 at 34.

<sup>17</sup> *Id.* at 36.

### **III. UPS GENERALLY SUPPORTS THE COMMISSION'S PROPOSALS TO REORGANIZE RULES FOR CLARITY**

The Commission proposes to divide 39 C.F.R. § 3007 into four subparts: (A) general provisions, (B) rules on submitting non-public information, (C) rules on seeking access to non-public information, and (D) rules on seeking public disclosure on non-public material. The vast majority of the changes proposed consist of reorganizing content in the existing § 3007 to improve clarity, while a minority of the changes consists of clarifying procedural issues, removing redundant definitions, or codifying existing PRC practices. Insofar as this reorganization is designed to improve clarity and remove redundancies, UPS generally supports these proposals, including the modifications to the proposed Appendix A, which updates templates and headings to improve readability and conform to rule changes.

### **CONCLUSION**

The Commission cannot carry out its duties without workable procedures for safeguarding information deserving of non-public status. Yet, protecting the public interest also requires public disclosure of as much information as possible, given the limited resources of the Commission, the vastness of the postal industry, and the need to ameliorate potential competitive risks from a government agency selling both market-dominant and competitive products. UPS generally supports the proposed revisions and clarifications in Order No. 4403 to the extent they promote greater transparency. UPS urges the Commission to maintain the current rules' expiration of non-public status after ten years, and to clarify that the materials should either be automatically made

available to the public, or that the burden for justifying non-disclosure should be placed on those who want extended non-disclosure for such materials.

Respectfully submitted,

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